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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 531

ELMER HARTZEL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF ELMER HARTZEL, PETITIONER.

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Statement.

So far as the facts of this case are concerned, after analysis by opposing counsel, they remain the same as stated in petitioner's brief filed herein. Some inferences, differing from those of petitioner, are drawn by Government Counsel but they do not *supply evidence* which the Government failed to produce, nor change the controlling effect of that *lack of* evidence. The documents stand alone so far as intent is concerned, and arguments do not increase their probative effect.

Opposing counsel call attention to the fact that a bundle of 188 addressed envelopes was found in a paper sack, with literature, in the bathroom of Hartsel's home. They were not shown to have been used for any purpose, nor for what purpose they were intended to be used. No point was made on the trial as to the envelopes other than the fact that the 188 envelopes were so found (Rec. 21, 30). They were not particularized in the bill of exceptions.

The three articles set out in the indictment are copied in full in the Government's brief but when looked at they do not disclose any reference to the charge made in the indictment, neither to the draft, volunteering, army, or the naval forces, or the war service, or any objectives to which the law is directed.

The statement as credited to Hartzel in the Government's brief, page 14, that the mailing of the documents "was not to improve the morale of the troops" (R. 84), was in response to the District Attorney's question put on cross examination as to whether he had written the articles for the purpose of improving the morale of the troops. The fact is that, on the contrary, the documents show they were not written with the Army, Naval or other forces in mind. In answer to a question of the District Attorney Hartzel said,

> "I had no intent to do anything or any of the things charged in the indictment or to undermine the morale of the troops" (R. 84).

Hartzel explained that he sent the documents out anonymously because he almost lost his job several times (R. 84).

But looked at from any angle, the essential facts remain the same: The documents bear no reference upon their face to any of the things prohibited by the statute, and no proof of specific intent was made independently thereof; and that the articles went out under seal to headline per-

sonalities, individually, and were not published generally to the world, nor to the armed forces; so the facts of this case bear no similarity nor resemblance to the cases cited by the Government.

We reply to the Government's arguments in the order presented.

I.

The court did not and would not refer to the necessary specific intent in his instructions to the jury.

We point out that the Court would not utter the words "specific intent" before the jury, although requested, definitely, when in chambers in conference as to instructions prior to the charge, to instruct the jury as to specific intent, and to charge the jury that defendants

> "were charged with having done those acts with a criminal intent in mind; that the intent charged in the indictment is what is known in law as a specific intent which means that the defendants must have had at the time in question an actual or specific intention in mind to produce the result charged in the indictment; that though the jury may believe that the defendants or some or more of them did the acts charged in the indictment, still the jury may not find the defendants or either of them guilty as charged unless the jury also find that the acts were done with *an actual or specific intention in mind to commit the offenses charged in the indictment;* and that the jury will not be at liberty to presume that the defendants intended the natural and probable consequences of their acts, or of the language used, *unless the jury also find that such actual, specific intention accompanied said acts.*" (R. 87) (Italics here for emphasis)

But the court did not so instruct, and on the contrary, charged only as to general intent *without differentiation as between general and specific intent;* and when again requested to do so the court, instead of using the words

"specific intent" made the charge *more general* by telling the jury they were at liberty

> "to presume that the defendants intended the natural and probable result of the language used." (R. 99)

which was telling the jury that if they found a general intent from the face of the documents they might find defendant guilty without and regardless of all specific intent.

Counsel for the Government infer at pages 25 and 26 of their brief that counsel for Hartzel was satisfied with the charge made to the jury on the subject of specific intent, but the record does so show that what counsel did do was to urge upon the trial judge that he give an instruction to the jury which would cover the point of *specific intent*, or *particular intent*, or whatever the judge might call it in his own language, just so the jury were instructed upon that point.

But the court did not do so, and, he would not put the words "specific intent", or particular intent into the ear of the jury, nor give them an equivalent expression.

Government's counsel say at page 26-27 of their argument that

> "The emphasis throughout the charge was on the requirement of specific intent",

which is an exactly opposite meaning to the wording of the charge.

Opposing counsel also say at page 27 of their argument,

> "A lay jury would be even less likely than a trained lawyer to find in the charge any antithesis between specific intent and a constructive intent presumed as a matter of law."

We reply that first, there is no presumption of law to be indulged in such case; for such ruling shifts the burden of proof to the defendant and correspondingly relieves the Government of making essential proof; and second, we say, certainly the jury would hardly see any difference between a "specific intent", a "general intent" and a "presumed

intent" *unless the judge should educate the jury upon the difference* between those types of intents by *differentiating them in his charge*. And that is just the objection here made; and the refusal of the court to be specific, and to so charge the jury, is the error of the trial court complained of.

The refusal of the court to so charge made the difference between innocence and guilt; i.e., between the constitutional right to freedom of speech and the denial thereof,—the right to mail letters to head line personalities under seal and the denial thereof. Without that instruction as to the specific, guilty intent, properly spoken to the jury, and driven home by differentiation, the defendant did not have a trial by jury upon the very ultimate issue in the case: whether he, at the time of mailing out the documents, mailed them *with the specific intent charged in the indictment*.

And the Circuit Court of Appeals, by its decision, then cut defendant out of a jury trial by holding that while Hartzel was entitled to have the jury pass upon that question of specific intent, yet they denied him that right *by affirming the case* and itself passing upon the very question that should have been submitted to the jury, but which the trial court withheld from the jury by ignoring in the face of requests.

Of course, as opposing counsel suggest, the attorney for defendant was pleased to have the court instruct the jury upon the clear and present danger theory, and, obviously upon the theory that such an instruction, if coupled with an instruction as to specific intent, would have meant that defendant would have been found not guilty, for the letters presented no clear and present danger, and no specific intent had been shown.

Of course we made no request for the court to instruct the jury that it must limit its consideration to the documents alone, for there was no such right, but we did ask that the jury be told that from all the evidence it was necessary that a specific intent appear, and we did ask for a directed verdict, which protested the point.

Opposing counsel say that this court, in the cases of *Pierce* v. *U. S.*, 252 U. S. 239, *Abrams* v. *U. S.* 250 U. S. 616 and *Schaefer* v. *U. S.*, 251 U. S. 466 has upheld convictions without insistence upon a showing of specific intent. On the contrary the very dispute in those cases was upon the question whether the specific intent was upon the face of the documents.

In the *Pierce* case the document in question had many violent expressions on the subject matter of the draft and armed forces; the documents in the *Abrams* case likewise contain violent language. The *Schaeffer* case was based on publication in a newspaper of false reports where guilt was based upon the face of the document tested by the truth of the matter involved. In those cases the intent was shown by what appeared upon the face of documents and the point here made is that there is an absence of language on the face of the documents tending to show a specific intent. There is the difference.

We are not here contending that the trial court did not give a dispassionate charge (as it is characterized by opposing counsel,) to the jury but we do say that the court refused, after repeated requests, to charge the jury definitely upon specific intent,—*the exact type of intent inherent in the crime* and did tell the jury that they could *presume intent* from the evidence, this excusing the Government from the necessity of making proof.

II and III.

The evidence does not sustain the conviction for obstructing the recruiting and enlistment service, or for causing or attempting to cause insubordination, mutiny, etc.

There can be no question here but that the objective of defendant Hartzel was solely to criticize certain elements, individuals and governments, and that his intent applies di

rectly to the obvious, not indirectly to some one, or character, or purpose not mentioned. And that is just the reason why specific intent must have been independently proven. Specific intent cannot be *presumed*, for, to give such evidence the character of a presumption, shifts the bruden of proof to the defendant, who must then combat something that does not exist in fact, but only in fiction. He must shadow box to knock down a straw man.

Whenever it becomes necessary to make an *argument* to prove that a specific intent arises out of the face of a document, just there it becomes obvious that no specific intent was shown, for it is the very absence of specific intent that makes it necessary to argue,—to show a plausibility,—not a fact. It is *fact beyond doubt*,—not arguments, deductions, or presumptions, that show specific intent.

What is an obstruction? Obviously, something that gets in the way and becomes a hindrance to the Government to replenishing the man-power. Writing to high ranking officers of the armed forces would not in anywise obstruct recruiting or the draft, nor would the writing to other persons of headline quality. Congress obviously meant just what it said in the Act, and no more. There is no crime if no obstruction is *wilfully* accomplished. It is a thing done that can be seen and known,—not merely visioned or thought of,—that is, contemplated by the law. Neither argument nor presumptions are *substitutes for proof* when it is sought to be shown that a specific intent arises upon the face of a letter written to others.

There should be no straining of the law to punish a person for something he did not intend nor in fact commit. The proof does not show a crime within the Sedition Act and that law cannot be stretched broad enough to cover it.

The independent proof made by the Government had no tendency to show that the defendant Hartzel ever had in-

mind the draft, volunteer service or subject matter of the statute.

To sustain the conviction on any count in the indictment is to put sentiments into the defendants mind he never entertained and to write facts into the documents that do not there appear.

After all the inquiry here is as to whether there was a specific guilty intent in the mind of Hartzel to violate the Sedition Act.

Conclusion.

Specific intent is an essential element of the crime in question here where the Government has set out in the indictment, as a means, the publication and dissemination of certain articles, of which only, the crime was *said to have been committed*. That allegation could only be proven by showing that the defendant had, when he mailed the documents, an actual, guilty, specific intent to produce the results charged. The Government made no showing of intent beyond the faces of the documents, and they showed none. Collateral proof of incidents did not give to the faces of the documents any more force than is obvious thereon.

So no crime was proven and the judgment of the Circuit Court of Appeals and the District Court should be reversed, which is respectfully requested.

Respectfully submitted,

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Attorneys for Petitioner.